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**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION**

NEFTALI MONTERROSA, individually and  
as co-successor-in-interest to Decedent SEAN  
MONTERROSA; NORA MONTERROSA,  
individually and as co-successor-in-interest to  
Decedent SEAN MONTERROSA;  
MICHELLE MONTERROSA, individually;  
ASHLEY MONTERROSA, individually,

Plaintiff,

vs.

CITY OF VALLEJO, a municipal  
corporation; JARRETT TONN, individually,  
and, Vallejo police officers DOES 1-25,  
inclusive,

Defendants.

**Case No: 2:20-cv-01563-TLN-DB**

**DEFENDANT CITY OF VALLEJO'S  
NOTICE OF MOTION AND MOTION  
FOR PROTECTIVE ORDER;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

**Date: December 3, 2020**

**Time: 2:00 p.m.**

**Crtrm: 2**

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**TO ALL PARTIES AND THEIR COUNSEL OF RECORD HEREIN:**

**PLEASE TAKE NOTICE** that on December 3, 2020 at 2:00 p.m. in Courtroom 2 of the above Court, Defendants City of Vallejo and Jarrett Tonn will and hereby do move for a protective order prohibiting Plaintiffs' counsel from making further public statements during the pendency of this action regarding (1) the character, credibility, or reputation of a party; (2) the identity of a witness or the expected testimony of a party or a witness; (3) the contents of any pretrial confession, admission, or statement given by a party or that person's refusal or failure to make a statement; (4) the identity or nature of physical evidence expected to be presented or the absence of such physical evidence; (5) the strengths or weaknesses of the case of either party; (6) the character, credibility, or reputation of the Vallejo Police Department; and (7) any other information counsel knows or reasonably should know is likely to be inadmissible as evidence and would create a substantial risk of prejudice if disclosed.

This motion is made pursuant to *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991) and *Levine v. U.S. Dist. Court for Cent. Dist. of California*, 764 F.2d 590, 591 (9th Cir. 1985) on the grounds that Plaintiffs' counsel's ongoing statements to media and the public present a substantial likelihood of prejudicing the integrity of the pending proceedings and pose a serious and imminent threat to Defendants' right to receive a fair trial by an impartial jury and there are no less restrictive alternatives available to protect this right.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, Declaration of Katelyn Knight, and on such other written and oral argument as may be presented to the Court.

DATED: October 6, 2020

Respectfully submitted,

/s/ Katelyn M. Knight

MEERA BHATT

KATELYN M. KNIGHT

FARRAH HUSSEIN

Attorneys for Defendants

CITY OF VALLEJO and JARRETT TONN

**MEMORANDUM OF POINTS & AUTHORITIES**

**I.**

**INTRODUCTION**

This action arises from an officer-involved shooting that took place in the middle of the most extensive and chaotic organized crime spree the City of Vallejo has ever experienced. On the night of June 1, 2020 and early morning hours of June 2, 2020, caravans of looters planned to target Vallejo and were systematically burglarizing pharmacies, marijuana dispensaries, and gun stores before recklessly fleeing at high speeds. The police force was overwhelmed. In the midst of this chaos, a group of officers responded to a call for assistance with a group of looters that were observed breaking into Walgreens pharmacy—the third burglary at that location that night. As the officers were pulling into the parking lot, they heard a broadcast over the radio that the suspects were “armed, possibly armed”. At that moment, a suspect ran from the Walgreens toward a waiting black sedan. Instead of jumping into the sedan and fleeing, the suspect abruptly stopped and turned toward the officers in a crouching down half-kneeling position as if preparing to shoot and moved his hands toward what appeared to be the butt of a handgun near his waist. The officer seated in the rear of the police vehicle fired five shots at the suspect through the windshield, striking and mortally wounding him. The item that had appeared to be the butt of a handgun was later found to be the butt of a hammer protruding from the front pocket of the suspect’s hooded sweatshirt.

Since this incident took place, the Burris Firm has been quite literally trying this case in the media, including a 45-minute press conference during which Plaintiffs’ counsel used demonstrative aids to discuss the distance between the shooting officer and suspect, the evidence available and not available and its impact, and entry and exit wounds, and attempted to impeach witnesses with information about their background. Plaintiffs’ counsel has repeatedly and incorrectly stated that the suspect, Sean Monterrosa, was on his knees with his hands up in surrender, despite the fact that they have not seen any of the evidence relevant to what Monterrosa was doing at the time of the incident. Plaintiffs’ counsel has also repeatedly referred to the shooting as a murder, insinuated that individuals associated with the City are lying or have

1 tampered with the criminal investigation, communicated with the District Attorney to attempt to  
2 influence her decision, and repeatedly made inflammatory comments to prejudice the public  
3 against Defendants.

4 Defendants respectfully request that the Court issue a protective order prohibiting  
5 Plaintiffs' counsel from making further public statements during the pendency of this action  
6 regarding (1) the character, credibility, or reputation of a party; (2) the identity of a witness or  
7 the expected testimony of a party or a witness; (3) the contents of any pretrial confession,  
8 admission, or statement given by a party or that person's refusal or failure to make a statement;  
9 (4) the identity or nature of physical evidence expected to be presented or the absence of such  
10 physical evidence; (5) the strengths or weaknesses of the case of either party; (6) the character,  
11 credibility, or reputation of the Vallejo Police Department; and (7) any other information  
12 Plaintiffs' counsel knows or reasonably should know is likely to be inadmissible as evidence and  
13 would create a substantial risk of prejudice if disclosed. Such an order is not only appropriate in  
14 this case, it is necessary to ensure that Defendants receive a fair trial by an impartial jury.

## 15 II.

### 16 BACKGROUND

#### 17 A. Factual Background

18 This case arises from an officer-involved shooting that took place on June 2, 2020. In the  
19 wake of the civil unrest following the killing of George Floyd, caravans of looters planned to  
20 target Vallejo and were systematically burglarizing pharmacies, marijuana dispensaries, and gun  
21 stores before recklessly fleeing at high speeds. Portions of Vallejo City Hall were set on fire.  
22 The City of Vallejo, along with most other Bay Area cities and counties<sup>1</sup>, declared a local  
23 emergency and imposed a curfew. Despite the curfew, the City of Vallejo experienced an  
24 unprecedented onslaught of organized criminal activity on the night of the incident. Even with  
25 support from allied agencies, the City's police force was overwhelmed.

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26  
27 <sup>1</sup> Including City of Oakland, City of San Jose, City of Palo Alto, City of Santa Clara, City of Pittsburg, City of  
28 Walnut Creek, City of Lafayette, City of Moraga, City of Orinda, City of Fremont, City of San Francisco, City of  
Berkeley, City of Alameda, City of Hayward, City of San Leandro, City of Antioch, City of Danville, City of  
Pleasant Hill, City of Concord, City of American Canyon, City of Santa Rosa, City of Windsor, Napa County,  
Solano County, Contra Costa County, San Mateo County, and Alameda County.

1 Just after midnight, a police captain assisting with patrol saw a group of looters breaking  
2 into the Walgreens at 1050 Redwood Street in downtown Vallejo. The Vallejo Police  
3 Department had received multiple 911 calls reporting criminal activity at that location and had  
4 already responded to two burglaries in progress. The captain called for assistance and three  
5 detectives from the Vallejo Police Department's specialized crime reduction unit in an unmarked  
6 police vehicle responded. Together, the team developed a plan to approach the parking lot from  
7 both sides to block in the looters' vehicles and take them into custody.

8 As the officers were pulling into the parking lot, the police captain saw one of the looters  
9 acting as a lookout with one hand to his mouth and his arm extended down holding what  
10 appeared to be a weapon—he broadcast over the radio that the suspects were “armed, possibly  
11 armed”. The officers in the unmarked SUV activated their red and blue police lights and as they  
12 entered the parking lot, looters immediately began piling into two vehicles to flee the scene. At  
13 that moment, the officers in the SUV saw one of the suspects run from the Walgreens toward a  
14 black sedan waiting in the parking lot. Instead of entering the vehicle, the suspect abruptly  
15 stopped and turned toward the officers in a crouching down half-kneeling position as if in  
16 preparation to shoot and moved his hands toward what appeared to be the butt of a handgun near  
17 his waist. The officer seated in the rear of the SUV fired five shots at the suspect through the  
18 windshield. One of those shots hit the suspect, who was found to have the butt of a hammer  
19 protruding from the front pocket of his hooded sweatshirt, and who succumbed to the injury  
20 approximately an hour later. At the same time, the black sedan fled the scene and rammed into  
21 the police captain's vehicle, causing the airbag to deploy.

22 The National Guard deployed 8,000 troops throughout the State of California in late May  
23 and early June to combat the violence and criminal activity occurring around this time. Troops  
24 were deployed to the City of Vallejo on June 2, 2020 and stayed for almost a week.

25 **B. Efforts to Influence this Case through the Media by Plaintiffs and their Counsel**

26 Immediately after the officer-involved shooting, Plaintiffs' counsel launched a campaign  
27 to influence the media and the community from which potential jurors would be drawn. On June  
28 3, 2020, Plaintiffs' counsel John Burris made statements to the media that “this young man was

1 shot multiple times while he was on his knees and appeared to be trying to surrender” and that  
 2 “you don’t get to arbitrarily shoot someone in a panic, just because the situation is excitable”.  
 3 (Knight Decl., Exs. 2-3.) Counsel’s statement that Monterrosa was on his knees with his hands  
 4 up and surrendering at the time of the incident is completely false. It was not supported by any  
 5 statements issued by the Police Department or the City, and is not supported by any of the  
 6 evidence in this case. When he initially released preliminary information about the incident to  
 7 the public, the Chief of Police stated that Monterrosa was running from the Walgreens toward a  
 8 black sedan when he suddenly stopped and took a kneeling position, moving his hands above his  
 9 waist and revealing what appeared to be the butt of a handgun. At no point did the Chief state or  
 10 suggest that Monterrosa was putting his hands up and surrendering.

11 On June 5, 2020, the Guardian published an article entitled “Vallejo police kill unarmed  
 12 22-year-old, who was on his knees with his hands up”, relying on similar statements by  
 13 Plaintiffs’ counsel Melissa Nold. The article states:

14 “When confronted by the police, he dropped to his knees and  
 15 surrendered, and they fired at him,” said Melissa Nold, a Vallejo  
 16 civil rights attorney representing Monterrosa’s family. “He wasn’t  
 17 doing anything to warrant it. They shot him from inside their car.  
 What opportunity did they give him to survive that situation? ...  
 It’s egregiously bad.”

18 (Knight Decl., Ex. 4.) Nold also told the Guardian that the Department “has a track record of  
 19 initially misrepresenting the circumstances of killings, which the public later learns when video  
 20 is released.” (Knight Decl., Ex. 4.) On June 6, 2020, the San Francisco Chronicle reported  
 21 further statements by John Burris that “Sean was on his knees, and he was putting his hands up  
 22 — what else can you do? He never reached for anything, he never charged for anyone, he never  
 23 said anything of a threatening nature, but yet he was shot and killed by this officer. It’s just flat  
 24 out murder.” (Knight Decl., Ex. 5.)

25 Consistent with prior practice and safety concerns, the City did not immediately release  
 26 the names of the involved officers following the officer-involved shooting. On June 5, 2020,  
 27 several news agencies and quasi-news agencies identified Jarrett Tonn as the shooting officer  
 28 based on unnamed named sources. (Knight Decl., Exs. 6-9.) Officer Tonn immediately began  
 receiving death threats and his home address was posted online. On June 12, 2020, the Vallejo



1 Police Officers' Association filed a complaint for declaratory relief and for a preliminary and  
2 permanent injunction to prohibit the City from releasing the names of the involved officers  
3 pursuant to Penal Code § 832.7(b)(5)(D), which requires redaction of police records "[w]here  
4 there is a specific, articulable, and particularized reason to believe that disclosure of the record  
5 would pose a significant danger to the physical safety of the peace officer, custodial officer, or  
6 another person." Based on the evidence presented, the Court imposed a temporary restraining  
7 order and preliminary injunction prohibiting the City from disclosing the names of the involved  
8 officers. The injunction is currently in place and the suit is still pending.

9 On June 14, 2020, Plaintiffs' and their counsel participated in a protest and rally in front  
10 of City Hall. Plaintiff's counsel John Burris again repeated false statements about the incident,  
11 reportedly saying:

12 The child was on his knees. And when you're on your knees, your  
13 hands are up that is surrendering. That is not a basis to shoot and  
14 kill him. And so it is our responsibility to ensure the safety and  
15 protect Sean and his image and his life. And to make sure his  
16 family appreciates that his life has not been lost in vain. It is  
17 fundamentally wrong to shoot someone who was trying to  
18 surrender.

16 (Knight Decl., Ex. 10.) At the same rally, Plaintiffs' counsel Melissa Nold reportedly stated  
17 "The last text that he sent out was to get people to sign a petition regarding George Floyd. So he  
18 was a young man that was cognizant of the social justice issues that unbeknownst to him minutes  
19 later - he was going to you know - his memory was going to be a part of changing police  
20 violence". (Knight Decl., Ex. 10.) Burris spoke to the San Francisco Chronicle again a few days  
21 later, making similar statements. (Knight Decl., Ex. 11.)

22 On June 17, 2020, the Sacramento Bee reported statements by Plaintiff's counsel Melissa  
23 Nold:

24 "The city of Vallejo has a long history of distrust in the  
25 community. We don't trust the police," Nold said. "Unfortunately  
26 police have been speculating that Black and brown people 'might  
27 do something bad' and have been killing them for decades.  
28 Nobody draws a hammer on a police officer because it's not a  
gun."

(Knight Decl., Ex. 12.)

1 On June 20, 2020, the Davis Vanguard reported that John Burris and Melissa Nold went  
2 to the Solano County District Attorney's Office to ask her to either prosecute the officer involved  
3 in the shooting or recuse herself. (Knight Decl., Ex. 13) Less than two weeks later, District  
4 Attorney Krishna Abrams issued a statement that she would be recusing herself due to a  
5 "perceived conflict".<sup>2</sup>

6 Following the City's release of the critical incident video pursuant to AB 748, Plaintiff's  
7 counsel John Burris again made statements to the Davis Vanguard designed to impugn the Police  
8 Chief's credibility. Burris reportedly stated, with no basis, that the Police Chief gave a  
9 description of the incident he said came from a video and is now stating there is no video  
10 showing Monterrosa at the time of the shooting. (Knight Decl., Ex. 14.) An article published by  
11 the Davis Vanguard paraphrases and quotes John Burris as follows:  
12

13 "He said that he saw Sean running, stopping, kneeling down as if  
14 he was trying to surrender and he got shot," Burris said. The chief  
purportedly said, "I've never seen anything like it."

15 "That certainly suggests there was a video," he said. "Today he  
16 said, there's no video. His description was that Sean was running,  
he kneeled down in a crouching position, as if he was going to  
17 attack the police – who were in front of him in a pickup truck."

18 \* \* \*

19 He was particularly alarmed that the chief was describing the video  
early and "now he says there was no video."

20 "The question is, what information did he have that allowed him to  
make the statement that he made early?" he asked.

21 What was also alarming is what was not shown in the video. "We  
22 didn't see him running," he said. "We didn't see him go to the  
ground. We didn't see any preliminary steps that were made by  
23 the boy before he was shot."

24 "It was a sham on the part of Vallejo PD," he said.

25 (Knight Decl., Ex. 14.) Burris also made statements incredibly, and again baselessly, insinuating  
26 that the Police Department destroyed other video evidence:  
27

28 <sup>2</sup> <https://www.youtube.com/watch?v=QVdgg9MVZ6k>

“Vallejo, as is required by state law, has body cameras. But, according to Burris, the camera came on—but after the shooting. There was also a drone, “but the drone somehow got destroyed.” Also the video from Walgreens itself was “destroyed.”

“Conveniently all the video tapes were destroyed or not available,” he said. “We certainly didn’t see any of the shooting.”

(Knight Decl., Exs. 14, 21.)

On July 9, 2020, Plaintiff’s counsel Melissa Nold reached out to defense counsel to specifically request that the vehicle being driven at the time of the incident be preserved as evidence, along with a drone that had been flying that evening and was collected as evidence. After consulting with the Department, it was determined that the vehicle had already been placed back into service. Defense counsel advised Plaintiff’s counsel of that fact and confirmed that the drone would be preserved post-examination. (Knight Decl., ¶ 16.) Nold immediately reported to Otis Taylor of the San Francisco Chronicle that evidence of the shooting had been destroyed. (Knight Decl., Ex. 15.) Nold also gave an interview to NBC Bay Area, stating: “Now this evidence is gone forever. Once they put that truck back into service, we’ll never know what condition it was in at the time that night.”<sup>3</sup> (Knight Decl., Ex. 16.)

Following statements by the Police Department that two lieutenants had been placed on administrative leave pending an investigation into handling of the windshield, Burris gave statements to the Davis Vanguard suggesting that the Vallejo Police Officers’ Association president was responsible and was engaged in trying to “misdirect” the criminal investigation. Burris further stated “The lieutenant must have thought it had significance because he destroyed it. And he’s an experienced police officer.” (Knight Decl., Ex. 17.) Burris also gave an interview to ABC, stating “someone did this deliberately”.<sup>4</sup>

On July 13, 2020, the San Francisco Chronicle published an article entitled “One thing clear from video of Sean Monterrosa shooting: Public can’t trust Vallejo police to be transparent”. (Knight Decl., Ex. 18.) The article relied on statements from Plaintiff’s counsel

<sup>3</sup> <https://www.nbcbayarea.com/news/local/north-bay/sean-monterrosas-family-fears-evidence-from-his-killing-was-destroyed/2326285/>

<sup>4</sup> <https://abc10.com/embeds/video/103-0534f309-a348-468d-972c-c00b06a492c6/iframe?jwsourc=cl>

1 Melissa Nold attempting to discredit the officers' accounts of the incident ("I find it hard to  
2 believe that the officers in the front seat of the car saw what they thought (the officer who fired  
3 the rifle) saw, because why didn't they shoot?" she said. 'Why didn't the passenger shoot if they  
4 saw a guy point a gun at them? Obviously they didn't, because he didn't have a gun.').

5 On August 6, 2020, Plaintiffs' counsel held a forty-six-minute press conference  
6 discussing the case. During that press conference, counsel used and referred to four large  
7 demonstrative poster-board exhibits to present their case to the media. Those exhibits showed,  
8 1) the outline of a human figure with markings showing the entry and exit points of the gunshot  
9 wound; 2) a still from body-worn camera footage of the incident showing the location of the  
10 police SUV and the suspect; 3) a still from body-worn camera footage showing the windshield  
11 post-shooting and the officer's firearm—annotated with large red circles; and 4) an overhead  
12 view of a map of the Walgreens. (Knight Decl., Ex. 1 at 22:35-28:30.) Plaintiffs' counsel  
13 referred to these exhibits as he explained, for example, where he believed the officer's vehicle  
14 was located when the shooting took place, arguing that the suspect was far away when the  
15 shooting began (Knight Decl., Ex. 1 at 37:28-37:57), and the suspect's injuries and the entry and  
16 exit wounds (Knight Decl., Ex. 1 at 23:26-24:00).



17 Plaintiffs' counsel discussed specific statements by the involved officer and others on  
18 scene that were made following the incident and raised arguments about the meaning and context  
19  
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(Knight Decl., Ex. 1 at 15:25-16:15, 18:15-18:50). Although the Department has not identified the involved officer, Plaintiff's counsel discussed prior officer-involved shootings and civil lawsuits that Officer Tonn was involved in—the officer they believe was the shooting officer in this case. (Knight Decl., Ex. 1 at 14:57-15:25, 16:15-18:12). Plaintiffs' counsel further discussed the evidence involved in this incident and made arguments for how that evidence should be perceived and weighed. (Knight Decl., Ex. 1 at 15:50-16:12.)

Plaintiffs' counsel also made many statements during the press conference that were clearly intended to prejudice the media and the public against the City and the involved-officer in this case. For example, Plaintiffs' counsel stated:

- “This case is uh, very very disturbing, uh, to us, in many many ways because the shooting took place by an officer who has this history of using deadly force under circumstances that are that are quite questionable.” (Knight Decl., Ex. 1 at :48-1:04)
- “This is a trigger-happy officer, and potentially a homicidal officer.” (Knight Decl., Ex. 1 at 15:16-15:22)
- “I don't know if you can give the benefit of the doubt to an officer who has had three prior officer-involved shootings within literally five years.” (Knight Decl., Ex. 1 at 16:15-16:23)
- “From what the Chief initially said, he was on his knees, that he was running and he stopped and went to his knees and that he was surrendering and his hands were coming up like this, and he got shot.” (Knight Decl., Ex. 1 at 26:48-26:59)
- “Because this officer in my view was a panicky guy who had been involved in three other shootings, that he was scared to death by any little thing, shooting at anything that moved with a rifle, uh, you know that's, that's unconscionable, for me.” (Knight Decl., Ex. 1 at 29:03-29:18)
- “This is a situation where the police department itself should have taken this man's gun away from him awhile ago. He should not be on the streets of Vallejo policing the community with a gun. Desk job if you're going to keep him, but certainly keep him away from the streets and particularly against black and brown people. Ok, find a neighborhood where there are not black and brown people, let him do that, but he clearly is not a person that should be in a black and brown neighborhood.” (Knight Decl., Ex. 1 at 37:12-38:37)
- “The question though is, right now we don't know who the next person that he's going to shoot or kill is. We don't know when that will happen, but the odds are very good there is going to be another person, and probably more than one if it keeps it up.” (Knight Decl., Ex. 1 at 38:38-38:52)
- “The Captain says ‘you've been here before, it's gonna all be alright’. That is a message that clearly had been sent to this officer before. It's gonna be alright, don't worry about it, we've got your back, don't worry.” (Knight Decl., Ex. 1 at 39:12-39:24)

1 Additionally, over the past five months, Plaintiffs' counsel Melissa Nold has been  
2 engaged in an inflammatory twitter campaign against the City of Vallejo and the Vallejo Police  
3 Department, though she tweeted relatively infrequently prior to the Monterrosa shooting.

4 Among other things, she has tweeted:

- 5 • "Fire Officer Jarrett Tonn" – June 6, 2020
- 6 • "He tried to kill 3 men prior to killing Sean" – June 6, 2020
- 7 • "Yes the police department got rid of the windshield that Officer Tonn shot  
8 through, which was evidence for criminal and civil court" – July 14, 2020
- 9 • "It's time for the City of Vallejo to enter a reform plan, with a federal monitor for  
10 compliance!" – July 16, 2020
- 11 • "Why didn't the chief of police know about the destroyed evidence in the  
12 #seanmonterrosa case before I went public with it? Asking for a few thousand  
13 friends. If it's broke, fix it" – July 17, 2020
- 14 • Retweeting "I cannot stress enough that the Vallejo Police Department is engaged  
15 in a coverup of their murder of unarmed Sean Monterrosa. American policing is  
16 rotten to the core. Don't wait to speak up until it happens to somebody you know.  
17 #Justice4Sean" – July 16, 2020
- 18 • "But fyi @SpeakerPelosi Vallejo PD has been murdering people, destroying  
19 evidence and covering up their own crimes for decades. This isn't a new problem  
20 in Vallejo. Justice for... #SeanMonterrosa #WillieMcCoy #AngelRamos  
21 #AntonBarrett #RonellFoster #MarioRomero And on and on..." – July 17, 2020
- 22 • "Vallejo PD needs a federal monitor. The end" – July 18, 2020
- 23 • "Why hasn't the Vallejo Chief of Police announced the termination of Jarrett  
24 Tonn, the officer who murdered #seanmonterrosa?" – July 21, 2020
- 25 • Retweeting "Since a Vallejo police lieutenant has already been placed on leave  
26 for destroying evidence, you have to wonder about the absence of any video of  
27 the shooting of Sean Monterrosa" – July 24, 2020
- 28 • "Sean was murdered 2 months and we have not forgotten! Justice is coming!" –  
August 3, 2020
- "Vallejo PD is full of full grown demons, they don't need reform they need an  
exorcism." – August 5, 2020

(Knight Decl., Ex. 19.)

25 These are just a sample of the highly prejudicial, and either false or very misleading,  
26 public statements made by Plaintiffs' counsel by way of interviews with news organizations,  
27 press releases, press conferences, tweets, e-mails, and social media postings related to this  
28 matter.



1 **III.**

2 **ARGUMENT**

3 “Few interests under the Constitution are more fundamental than the right to a fair trial  
4 by impartial jurors”, and it is well established that attorneys may be enjoined from discussing a  
5 case publicly if their speech presents a substantial likelihood of prejudicing the integrity of the  
6 pending proceedings. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1032, 1074-75 (1991). “[A]s  
7 officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage  
8 in public debate that will redound to the detriment of the accused or that will obstruct the fair  
9 administration of justice.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 601, n.27 (1976). This  
10 obligation has been recognized and codified in the California Rules of Professional Conduct.  
11 Rule 3.6 provides in relevant part:

12 A lawyer who is participating or has participated in the  
13 investigation or litigation of a matter shall not make an  
14 extrajudicial statement that the lawyer knows\* or reasonably  
15 should know\* will (i) be disseminated by means of public  
communication and (ii) have a substantial\* likelihood of materially  
prejudicing an adjudicative proceeding in the matter.

16 Further, statements by the lawyers involved in a case are likely to be received as especially  
17 authoritative due to their special access to information through discovery and client  
18 communications. *Gentile, supra* at 1074.

19 The seminal case in the Ninth Circuit addressing the imposition of a protective order  
20 limiting speech of an attorney during the pendency of a lawsuit is *Levine v. U.S. Dist. Court for*  
21 *Cent. Dist. of California*, 764 F.2d 590, 591 (9th Cir. 1985). *Levine* was a criminal espionage  
22 case that received significant attention from the media both locally and nationally. The defense  
23 attorneys involved in the case gave interviews to media representatives and there were a number  
24 of articles published by news agencies quoting the defense attorneys. The attorneys had made  
25 multiple comments speaking to the merits of the case and the proceedings, such as:

- 26 • “I don't think the case should ever have been brought. The initial characterization  
27 by the government that this was a major espionage case with untold damage was  
an incorrect assessment.”
- 28 • "We've got two dummies here, no question about that...But these people should  
have never been taken seriously as spies. It's unrealistic to talk about the Miller

case in the same breath as other espionage cases that have come along in the last few years."

- "The dismissal of these charges means the government has now conceded that no documents were ever passed. It's also a concession that there's been no damage to national security"

*Id.* at 592-93. The trial court in *Levine* issued a restraining order prohibiting defendant's attorneys from communicating with the media regarding the merits of the case.

On appeal, and in analyzing the order as a prior restraint on speech, the Ninth Circuit held that an order prohibiting or limiting speech by those participating in a pending court proceeding may be imposed if (1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest; (2) the order is narrowly drawn; and (3) less restrictive alternatives are not available. *Id.* at 596 (internal citations omitted). In this instance, the Ninth Circuit found the order to be appropriate in light of the publicity surrounding the case and upheld it, but found that the prohibition of "any statements to members of the news media concerning any aspect of this case that bears upon the merits to be resolved by the jury" was overbroad. The Ninth Circuit directed the Trial Court to determine which types of extrajudicial statements pose a serious and imminent threat to the administration of justice and to fashion an order specifying the proscribed types of statements. *Id.* at 598-99. By way of example, the Ninth Circuit noted that it would be appropriate to proscribe statements relating to six subjects:

- (1) The character, credibility, or reputation of a party;
- (2) The identity of a witness or the expected testimony of a party or a witness;
- (3) The contents of any pretrial confession, admission, or statement given by a defendant or that person's refusal or failure to make a statement;
- (4) The identity or nature of physical evidence expected to be presented or the absence of such physical evidence;
- (5) The strengths or weaknesses of the case of either party; and
- (6) Any other information the lawyer knows or reasonably should know is likely to be inadmissible as evidence and would create a substantial risk of prejudice if disclosed.



1 *Id.* at 599.

2 A protective order in this case is necessary to ensure that Defendants receive a fair trial  
3 by an impartial jury. This matter arises from an officer-involved shooting at a time when police-  
4 related shootings and police conduct in general is receiving extra public interest and scrutiny.  
5 Even without Plaintiffs' counsel giving media interviews, there is likely to be significant interest  
6 and press related to this case. The conduct of Plaintiffs' counsel demonstrates their intent to  
7 spread bias and ensure that no juror will give the City of Vallejo or the involved officer a fair  
8 evaluation. Left unchecked,—it will taint the jury pool and result in incurable prejudice to  
9 Defendants.

10 The Burris firm's media activities pose a serious and imminent threat to Defendants'  
11 right to a fair trial and impartial jury. Even though the criminal investigation has not been  
12 completed and Defendants have not appeared in the case, Plaintiffs' attorneys have extensively  
13 commented on the evidence and its implications. After the City of Vallejo released body-worn  
14 camera footage of the incident, Plaintiffs' counsel made baseless statements to the media  
15 suggesting that there was no other video footage of the incident because the City had destroyed  
16 it—the City has not. (Knight Decl., Ex. 14.) After making a specific request to the City to  
17 preserve the vehicle the officers were driving and learning that evidentiary photos had been taken  
18 and the vehicle had been placed back in service, Plaintiffs' counsel immediately told the San  
19 Francisco Chronicle that the City had destroyed evidence of the shooting, then proceeded to  
20 make (again false and baseless) statements to the media that a lieutenant was trying to misdirect  
21 the investigation by destroying the windshield. (Knight Decl., Exs. 15, 17.)

22 Plaintiffs' counsel has repeatedly and falsely stated that Monterrosa was on his knees  
23 with his hands up in surrender, despite the fact that they have not seen any of the evidence  
24 relevant to what Monterrosa was doing at the time of the incident. (Knight Decl., Exs. 2-5, 10-  
25 11, 14, 20.) On many occasions, Plaintiffs' counsel has frequently referred to the shooting as a  
26 murder, communicated with the District Attorney to attempt to influence her decision to  
27 investigate, and repeatedly made inflammatory comments to prejudice the public against  
28 Defendants, including that: "Unfortunately police have been speculating that Black and brown

1 people ‘might do something bad’ and have been killing them for decades. Nobody draws a  
 2 hammer on a police officer because it’s not a gun.” (Knight Decl., Ex. 12.) The media coverage  
 3 of this case is pervasive. The statements at issue here are even more extreme than in the *Levine*  
 4 case, clearly supporting a finding that “the activity restrained poses either a clear and present  
 5 danger or a serious and imminent threat to a protected competing interest.” *Levine* at 596.

6 The order requested can be narrowly drawn in this case. As noted above, the Ninth  
 7 Circuit suggested that an appropriate order in *Levine* would restrain counsel from making  
 8 statements regarding:

- 9 (1) The character, credibility, or reputation of a party;
- 10 (2) The identity of a witness or the expected testimony of a party  
 11 or a witness;
- 12 (3) The contents of any pretrial confession, admission, or statement  
 13 given by a defendant or that person's refusal or failure to make a  
 statement;
- 14 (4) The identity or nature of physical evidence expected to be  
 presented or the absence of such physical evidence;
- 15 (5) The strengths or weaknesses of the case of either party; and
- 16 (6) Any other information the lawyer knows or reasonably should  
 17 know is likely to be inadmissible as evidence and would create a  
 18 substantial risk of prejudice if disclosed.

19 In addition to the above, in this case there should be an order restraining Plaintiffs’ counsel from  
 20 making prejudicial statements about the Vallejo Police Department as a whole. Plaintiffs’  
 21 counsel has repeatedly stated that the Vallejo Police Department is in need of a federal monitor  
 22 or a consent decree, that the department is full of officers who engage in misconduct, and that the  
 23 department needs to #firethefatal14. An order restraining Plaintiffs’ attorneys from making  
 24 prejudicial statements about an individual officer will not be sufficient to ensure an unbiased jury  
 25 if counsel continues to perpetuate the myth that the entire police department is corrupt.

26 No less restrictive alternatives exist in this case. Plaintiffs’ attorneys have demonstrated  
 27 that they will literally attempt to try the case in the media—complete with demonstrative  
 28 exhibits—if left unchecked. Further, it is important to enter the order now to prevent further  
 damage. Statements to the media are particularly prejudicial in the digital age, where a juror

1 sitting in trial three years from now can instantly view all of the prejudicial articles published in  
2 the last five months. Trial courts have "an affirmative constitutional duty to minimize the effects  
3 of prejudicial pretrial publicity." *Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1979). While  
4 the Court cannot remedy the damage that has already been done, it can prevent further damage.

5 **IV.**

6 **CONCLUSION**

7 For all of the reasons discussed herein, Defendants respectfully request that the Court  
8 issue a protective order in this case precluding Plaintiffs' counsel from making public statements  
9 during the pendency of this action regarding (1) the character, credibility, or reputation of a  
10 party; (2) the identity of a witness or the expected testimony of a party or a witness; (3) the  
11 contents of any pretrial confession, admission, or statement given by a party or that person's  
12 refusal or failure to make a statement; (4) the identity or nature of physical evidence expected to  
13 be presented or the absence of such physical evidence; (5) the strengths or weaknesses of the  
14 case of either party; (6) the character, credibility, or reputation of the Vallejo Police Department;  
15 and (7) any other information the lawyer knows or reasonably should know is likely to be  
16 inadmissible as evidence and would create a substantial risk of prejudice if disclosed.

17  
18 DATED: October 6, 2020

Respectfully submitted,

19  
20 /s/ Katelyn M. Knight

MEERA BHATT

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CITY OF VALLEJO and JARRETT TONN